



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 453 OF 2013**

**ISAAC PERE.....PLAINTIFF**

**VERSUS**

**TIMINA LEKENI OSOI.....DEFENDANT**

**RULING**

1. The plaintiff **Isaac Pere**, filed this suit against the defendant **Timina Leken Osoi** on **29<sup>th</sup> July, 2013**. Thereafter on **13<sup>th</sup> August, 2013** the plaintiff filed a notice of motion seeking prohibitory orders to restrain the defendant from transferring, leasing, alienating or in any manner dealing with land parcel **No.Nrk/Cis-Mara/Oleleshwa/3931**("suit land") pending the hearing and determination of the suit.
2. The application was heard *ex parte* and a temporary injunction issued restraining the defendant from transferring the suit land pending *Inter-parties* hearing.
3. In opposing the application, the defendant filed a replying affidavit as well as a notice of preliminary objection dated **4<sup>th</sup> September, 2013**. This preliminary objection is what is before me for determination.
4. The notice of preliminary objection was filed on the grounds that the suit was *res judicata* and the *ex parte* orders were obtained by fraudulent non-disclosure of material facts.
5. On **19<sup>th</sup> November, 2013** parties agreed that the preliminary objection be disposed off by way of written submissions. Counsel for defendant filed his written submissions on **18<sup>th</sup> December, 2013** and Counsel for the plaintiff did likewise on **4<sup>th</sup> April, 2014**.
7. The main issue raised by the defendant in the preliminary objection relates to the plaintiff's conduct in filing the suit and subsequently this application. It is his contention that there was material non-disclosure of facts regarding an earlier suit **Narok CMCC No 92 of 2010** which was heard and concluded in the defendant's favour and the filing of an appeal **Civil Appeal No 108 of 2013** therefore this suit and application are *resjudicata*.
8. In reply, the plaintiff submitted that the prayers sought in this application were distinct from those in **Narok CMCC No 92 of 2010** in that, the current suit also includes a prayer that the title held by the defendant be cancelled and the same be registered in the plaintiff's name, which prayer can only be determined by the High Court.
9. The definition of a preliminary objection was set out in the case of **Mukisa Biscuit Manufacturing**

**Co. Ltd vs West End Distributors Ltd (1969) EA 696.**

**"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."**

This was followed up by the judgment of **Sir Charles Newbold** in the same case:

**"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"**

I am satisfied that the two grounds raised by the defendant are points of Law and I will now proceed to consider the preliminary objection.

10. After considering the pleadings and submissions of both parties, I could not help but notice the glaring similarities in the two suits. In both **Narok CMCC No 92 of 2010** and the current suit, the subject is **Nrk/Cis-Mara/Oleleshwa/151** subdivided into **Nrk/Cis-Mara/Oleleshwa/3931** and **Nrk/Oleleshwa 3932**. The parties in the two suits are also the same. The substantive prayer sought in the Narok suit was;

**"An order of injunction prohibiting the defendant himself, his agents, servants or any other persons whomsoever from transferring, charging, leasing or in any other manner whatsoever interfering with the suit plot number Nrk/Cis-Mara/Oleleshwa/3931"**

In the instant suit, the application dated **29<sup>th</sup> July, 2013** filed on **13<sup>th</sup> August, 2013** and heard *ex parte*, sought similar prayers to Narok CMCC No.92 of 2010. The plaintiff sought the following prayer;

**" a declaration that the title deed was fraudulently obtained and therefore the name be cancelled from the title deed and records in respect to land parcel No. Nrk/CIS-Mara/Oleleshwa/3931 and the same do revert to the name of the plaintiff Isaac Pere".**

12. Looking at the prayers sought in both suits it is my humble view, that these prayers were substantially dealt with in the Narok case. I therefore find that this suit is *Resjudicata* Narok CMCC No.92 of 2010 and the court cannot contravene **Section 7 of the Civil Procedure Act, 2010** which provides;

**"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

13. The plaintiff was right in filing Civil Appeal No.108 of 2013 and he should wait for it to be heard and determined.

14. The issue of material non-disclosure of facts in an *ex-parte* application has been addressed in several cases, chief among them is the case of **Brink's - Mat Ltd v Elcombe** [1988] 3 All E.R. 188, where **Ralph Gibson, L.J.** delivered his speech as follows:

"In considering whether there has been relevant non-disclosure and what consequence the Court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to

the issues in these appeals appear to me to include the following. (i) The duty of the applicant is to make a full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the Judge to know in dealing with the application made; materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers. (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of inquiries. (v) If material non-disclosure is established the Court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.... see Bank Mellat v Nikpour at (91) per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Comrs case (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, it is not for every omission that the injunction will be automatically discharged.

A locus poenitentiae (chance of repentance) may sometimes be afforded. The Court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms: "

... when the whole of the facts, including that of the original non-disclosure, are before it, (the Court) may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed."

15. I agree with these well settled principles of law. The plaintiff's conduct makes it exceedingly difficult for this court to entertain his prayers both in his application and suit. I am convinced that if these facts had been disclosed at interlocutory stage, the court would have arrived at a different determination when considering the application had the plaintiff not deliberately misled the Court.

16. For the above reasons, I find that the plaintiff is guilty of non-disclosure of material facts. I allow the preliminary objection dated **4<sup>th</sup> September, 2013** and award costs for both the application and the suit to the defendant.

**Dated, signed and delivered in open court at Nakuru this 3<sup>rd</sup> day of October, 2014.**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

Mr Mwai for the plaintiff/respondent

N/A for the defendants

Emmanuel Maelo : Court Assistant

**L N WAITHAKA**

**JUDGE**